

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
CANNON, MAURICE,)	CAUSE NO. IP05-0052-CR-01-T/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) IP 05-52-CR-01 T/F
)
 MAURICE CANNON,)
)
 Defendant.)

ENTRY ON VARIOUS MOTIONS (DOC. NOS. 111, 112, 113 & 125)¹

Defendant, Maurice Cannon, is charged in the Indictment with possession of a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). This entry addresses three motions he filed on October 4, 2006. He filed a Request for Production of Grand Jury Testimony (Minutes) (Doc. No. 111), seeking to inspect the minutes of the grand jury that returned the Indictment against him. Defendant also filed a Request for Production of Documents by a Non-Party, With Attached Subpoena Duces Tecum (Doc. No. 112), seeking the employee files of several Indianapolis Police Officers. And he filed a Motion to Dismiss for Lack of Jurisdiction (Doc. No. 113). The government has responded to these motions, filed the transcripts of all grand jury testimony under seal, and filed a Motion to Quash Subpoena (Doc. No. 125).

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

Defendant's motions were filed long past the deadline for filing pretrial motions. The court previously noted that the deadline for filing motions and notices under Rules 12, 12.1, and 12.2 of the Federal Rules of Criminal Procedure originally was set for December 1, 2005, and twice extended, ultimately to February 21, 2006. (See Entry of 11/14/06, 2-3.) As before, the court could deny the motions under consideration based on their untimeliness alone; but instead, it will address each in turn.

Request for Grand Jury Testimony

Defendant believes that “two of the government witnesses[] may have committed perjury before the Grand Jury[.]” (Req. Produc. Grand Jury Test. 1.) He states that he has filed complaints against other officers of the same district as the four “testifying officers”—and believes other officers may have been motivated to testify untruthfully against him. He seeks information given by these four officers or by a third party in reference to their statements. (*Id.* at 2.) Mr. Cannon also seeks disclosure of grand jury minutes concerning “any relevant statements the government plans to use against him at trial.” (*Id.*) He contends that disclosure “is necessary in order to prevent the suppression of constitutionally protected material and to guarantee the public access to such material under the First Amendment of the United States Constitution.” (*Id.* at 3.)

A grand jury's proper functioning depends on the secrecy of its proceedings. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); see also *Dennis v. United States*, 384 U.S. 855, 869 (1966). Whether to order the disclosure of grand jury minutes to the defense is within the court's discretion. Fed. R. Crim. P. 6;

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398-99 (1959). A defendant seeking grand jury materials bears the burden of making “a strong showing of particularized need for grand jury materials” before disclosure will be allowed. *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983). Under the Supreme Court’s standard, a party seeking grand jury material under Rule 6(e) “must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed” *Douglas Oil*, 441 U.S. at 222; see *United States v. Campbell*, 324 F.3d 497, 499 (7th Cir. 2003). Mr. Cannon has not made such a showing.

The court has reviewed the grand jury transcript filed under seal by the government. The transcript does not contain any testimony by the four Indianapolis Police Officers referred to in the Defendant’s motion. The essence of the testimony before the grand jury is a synopsis by the ATF case agent of a compilation of the information reported by various police officers in connection with Mr. Cannon’s apprehension and arrest on the matters underlying the Indictment. The synopsis is not substantially different than the findings of fact made by the court in its rulings on the motions to suppress. (Doc. Nos. 81 & 88.) Consequently, the transcript would provide no impeachment or exculpatory material for the Defendant. The grand jury testimony contains a brief mention of statements made by Mr. Cannon subsequent to his arrest which is also not substantially different than the findings the court made about those statements in those rulings and, therefore, those statements have already been

disclosed to the Defendant. Thus, neither assertion provides a basis for disclosure of the grand jury testimony to the Defendant. Moreover, Mr. Cannon's elusive reference to "constitutionally protected material" is insufficient to outweigh the policy favoring grand jury secrecy. Therefore, the court **DENIES** Defendant's Request for Production of Grand Jury Testimony (Minutes) (Doc. No. 111).

Request for Production & Motion to Quash

Defendant has requested the production of documents by a non-party, with a subpoena duces tecum, pursuant to Rule 17(c)(1) of the Federal Rules of Criminal Procedure (Document No. 112). He seeks production from the Indianapolis Police Department ("IPD") of the employee files of several IPD Officers. The government in response filed its Motion to Quash Subpoena, contending that Mr. Cannon is on a fishing expedition. The government states that it recognizes its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

In *United States v. Nixon*, 418 U.S. 683 (1974), the United States Supreme Court identified a four-part test to guide trial courts in the issuance of subpoenas duces tecum in criminal cases pursuant to Rule 17(c). In order to require production before trial, the movant must show: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend

unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’” *Id.* at 699-700 (footnote omitted); see also *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) (“the documents must be essential to prepare for trial”).

These four factors indicate that Rule 17(c) is not intended to serve as a means of discovery in criminal cases, but rather functions “to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials.” *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). Thus, Rule 17(c) only allows for the production of documents that “a defendant knows to contain relevant evidence to an admissible issue at trial.” *Tokash*, 282 F.3d at 971 (citing, inter alia, *Nixon*, 418 U.S. at 700). Mere speculation and conclusory allegations, devoid of support, are insufficient to justify a request under Rule 17(c). Criminal defendants cannot use Rule 17(c) “to blindly comb through government records in a futile effort to find a defense to a criminal charge.” *Tokash*, 282 F.3d at 971.

Defendant makes no contention as to what the subpoenaed material would show beyond the speculative assertion that the officers’ personnel files may contain reports of misconduct relevant to his potential defense that the investigating officers “may have used illegal and outrageous conduct as well as deliberate disregard for the truth, not becoming of an officer” (Req. Produc. ¶ 1.) Defendant’s lack of specificity and inability to offer more than mere conjecture indeed suggests that he is attempting no more than a prohibited “fishing expedition.”

It does not seem that Defendant will be unfairly prejudiced by the denial of his production request as the Government, in its Motion to Quash Subpoena, recognized its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), to disclose material evidence, including impeachment evidence, favorable to the accused. And information undermining the credibility of a government witness is within the scope of *Brady*. See *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988).

Accordingly, Defendant's Request for Production (Doc. No. 112) is **DENIED** and the Government's Motion to Quash Subpoena (Doc. No. 125) is **GRANTED**.

Motion to Dismiss

Defendant seeks dismissal of the Indictment, contending that the court lacks subject matter jurisdiction because the Indictment does not show that he has affected commerce by any activity. He also attempts to raise a claim of selective prosecution.

Defendant offers no authority for the proposition that the indictment must allege, or the government must prove, he personally affected interstate commerce.² It is enough that the firearms at issue affect interstate commerce. "Commerce Clause challenges to the felon-in-possession statute fail 'because 922(g) itself contains a jurisdictional element, and because . . . prior movement of the firearm in interstate commerce . . . meet[s] that element.'" *United States v. Juarez*, 454 F.3d 717, 719 (7th

² It should be noted, though, that the Indictment does allege that Mr. Cannon's possession of the firearms was "in commerce and affecting commerce"

Cir. 2006) (quoting *United States v. Lemons*, 302 F.3d 769, 772 (7th Cir. 2002)). Any suggestion that *United States v. Lopez*, 514 U.S. 549 (1995) requires a more substantial connection to interstate commerce fails. See *United States v. Lewis*, 100 F.3d 49, 51-52 (7th Cir. 1996). And it is sufficient for purposes of subject matter jurisdiction that the firearms have traveled in interstate commerce “at some time after [their] manufacture.” *Juarez*, 454 F.3d at 719. The Seventh Circuit has rejected the notion that the firearms’ interstate travel must have some close temporal proximity to the defendant’s possession. *Lewis*, 100 F.3d at 52 (“A single journey across state lines, however remote from the defendant’s possession, is enough to establish the constitutionally minimal tie of a given weapon to interstate commerce[.]”).

Mr. Cannon repeatedly acknowledges in his motion that the firearms at issue traveled in interstate commerce. (Mot. Dismiss Lack Jurisdiction 3 (“all guns in the state of Indiana traveled previously” through interstate commerce) (emphasis in original); *id.* at 1-2 (“no guns are manufactured in the state of Indiana”); *id.* at 8 (“no guns are manufactured in the state of Indiana, therefore all of them at some point in time travel through interstate commerce”)). Thus, proof of facts establishing the prior movement across state lines of the firearms at issue would be enough to overcome his challenge to this court’s jurisdiction. But of more immediate concern, the Indictment adequately alleges the interstate commerce effect of the possession to overcome this aspect of the pretrial motion to dismiss.

According to Defendant, it is selective prosecution for the federal prosecutor to charge some defendants with felon in possession under federal law whereas others are

charged under state felon in possession laws. To establish improper selective prosecution, a defendant “must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.” *United States v. Darif*, 446 F.3d 701, 708 (7th Cir. 2006) (quotation omitted). Thus, to demonstrate a prima facie case of selective prosecution to entitle him to an evidentiary hearing, a defendant must show, inter alia, that “the decision to prosecute was based on an arbitrary classification such as race, religion, or the exercise of constitutional rights.” *Id.* Mr. Cannon has made no such showing here.

Accordingly, Defendant’s Motion to Dismiss for Lack of Jurisdiction (Doc. No. 113), including his request for a hearing, is **DENIED**.

Conclusion

As stated, the Motion to Quash (Doc. No. 125) is **GRANTED** and Defendant’s Subpoena Duces Tecum to the Indianapolis Police Department seeking the employee files of Officers Hayes, Lamle, Carrier, Harmon, and Miller is **QUASHED**. The Defendant’s Request for Production of Grand Jury Testimony (Minutes) (Doc. No. 111), the Defendant’s Request for Production (Doc. No. 112), and the Defendant’s Motion to Dismiss for Lack of Jurisdiction (Doc. No. 113) are **DENIED**.

ALL OF WHICH IS ENTERED this 11th day of December 2006.

John Daniel Tinder, Judge

United States District Court

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